

On May 14, 2009 appellant, then a 47-year-old nursing assistant, filed a traumatic injury claim alleging that on April 24, 2009 she experienced severe and sharp pain from her neck to her

right shoulder when an employing establishment police officer pulled her very tightly while handcuffing her arms behind her back.¹

The employing establishment controverted the claim on the grounds that appellant caused the injury by her willful misconduct. It stated that she was taken into custody for disorderly conduct by the employing establishment police. The employer contended that, at the time of her injury, appellant was not in the performance of duty and her injury was not work related. Appellant was leaving the building with a friend who was picking her up from work. The employing establishment alleged that her injury was proximately caused by her intent to injure or kill herself or another person or intoxication.

In an investigative report dated April 28, 2009, Jerry Donaldson, an employing establishment investigating officer, stated that on April 24, 2009 appellant was taken into custody for causing a disturbance, disorderly conduct and making threats. Officer Donaldson and Officer Plato were dispatched to appellant's work area based on a report by Candice Workman, a nursing manager, and Mark Rogers, a nurse administrator, who suspected that she was intoxicated. Ms. Workman related to Officer Donaldson that appellant's speech was slurred, she appeared to be disorientated and she was sleeping at her desk. She observed appellant ingesting unknown medication. Mr. Rogers called police operations because appellant refused to go to the health unit for evaluation. He stated that Jerry S. Rogers, appellant's boyfriend and former employee, was en route to take her home. Appellant subsequently agreed to evaluation and, as she was escorted to the health unit by Officers Donaldson, Plato and Williams, they encountered Jerry Rogers who yelled loudly and repeatedly at the officers, stating that appellant was not going anywhere. Officer Plato ordered him to leave the property. Jerry Rogers shouted that he was leaving but not without appellant; he took her by the arm and yelled loudly as they walked away. The police officers followed them. Jerry Rogers stopped walking. He turned towards Officer Donaldson and lunged forward with his shoulders back in a classic combative stance and screamed unintelligibly. Officer Donaldson placed Jerry Rogers under arrest. Jerry Rogers turned and attempted to walk away, but Officer Donaldson handcuffed his right wrist. He tensed up and began screaming for help. Officer Donaldson used soft hand restraint techniques to force Jerry Rogers' hands behind his back after he refused to do so. Once handcuffed, Jerry Rogers was escorted to police operations. Appellant began screaming. She was escorted to police operations by Officer Williams. Appellant stopped walking and pulled away from him. Jerry Rogers also refused to walk. As appellant and Officer Williams continued to walk, she stopped and refused to continue. Officers Donaldson and Williams placed her in handcuffs. Once appellant and Jerry Rogers arrived at police operations, Miranda rights were read to them. They refused to answer any questions. Appellant and Jerry Rogers were advised that a warrant would be sought against them. They were searched and no weapons or contraband were found. An "ACIC" check was negative. Jerry Rogers was released from police custody. Appellant agreed to an evaluation by Denise Willis, a nurse, and was escorted to the employing establishment health unit.

¹ The Office previously accepted that appellant sustained right shoulder, upper arm and rotator cuff strains while in the performance of duty on March 12, 2008 under File No. xxxxxx406.

By letter dated June 12, 2009, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit additional evidence pertaining to the assertions of her employer, specifically the allegations of intoxication and/or the influence of medications.

On August 7, 2009 appellant denied sleeping at work or taking any medication. She told a nurse manager that she was waiting for her representative before going to the employing establishment health unit. Appellant described the events precipitating being handcuffed as praying “oh God help us” as an employing establishment police officer hurt her arms, as well as those of Jerry Rogers.²

By decision dated August 18, 2009, the Office denied appellant’s claim, finding that the evidence did not establish that she sustained an injury while in the performance of duty. It found that her injury was a result of her own willful misconduct, as she refused to obey orders of the employing establishment security officers.

On August 24, 2009 appellant requested a review of the written record by an Office hearing representative.

In a November 20, 2009 decision, an Office hearing representative affirmed the August 18, 2009 decision.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty, unless the injury is caused by willful misconduct of the employee.³ Willful misconduct is generally regarded as deliberate conduct involving premeditation, obstinacy or intentional wrongdoing with the knowledge that it is likely to result in serious injury, or conduct that is in wanton or reckless disregard of probable injurious consequences.⁴

An allegation of willful misconduct is in the nature of an affirmative defense. The adjudicating agency has the burden, if it makes such an allegation, to prove that there was willful misconduct and that such misconduct caused the injury. If the adjudicator believes that the evidence in the case record justifies a finding of the injury being caused by willful misconduct of the claimant, he or she has the responsibility of making such a finding in the original adjudication of the case.⁵

² Appellant submitted a July 1, 2008 power of attorney to Jerry Rogers authorizing him to act with regard to a case before the Office.

³ 5 U.S.C. § 8102(a)(1).

⁴ *J.J.*, 61 ECAB ____ (Docket No. 09-982, issued January 6, 2010); *J.S.*, 60 ECAB ____ (Docket No. 08-1654, issued February 2, 2009); *Judith D. Jenkins (Ted L. Jenkins)*, 32 ECAB 1219 (1981); *Abraham Finkelstein*, 4 ECAB 130 n.8 (1951).

⁵ *Paul Raymond Kuyoth*, 27 ECAB 498, 505 (1976), *reaff’d on recon*, 27 ECAB 253 (1976).

ANALYSIS

The Board has carefully considered the circumstances of appellant's injury on April 24, 2009 and finds that the weight of the evidence supports a finding of willful misconduct. Appellant contends that she is entitled to wage-loss compensation benefits as she was in the performance of duty when she was injured. However, the Board has held that willful misconduct is a statutory exclusion to coverage. Accordingly, even if appellant sustained an injury in the performance of duty, there is no coverage under the Act if the injury was caused by her willful misconduct.⁶

The Office invoked the affirmative defense of willful misconduct. The Board finds that the weight of the evidence supports a finding of willful misconduct. The Board gives particular weight to the account given by Officer Donaldson, an investigating police officer, who was involved in the April 24, 2009 incident. Officer Donaldson's statement provides a credible account of what happened. His investigative report establishes that appellant was being escorted to the employee health clinic as she appeared to be disoriented. On the way, they encountered her boyfriend, Jerry Rogers, who interfered repeatedly with the officers and was ordered to leave the property. Appellant was handcuffed because she stopped walking, screamed and pulled away from Officer Williams. She was escorted to police operations following the arrest and handcuffing of Jerry Rogers for the verbal abuse and combative behavior he directed towards Officer Donaldson. Officer Donaldson stated that, at the time appellant was handcuffed, she was preparing to leave the premises with Jerry Rogers who did not want her to undergo evaluation at the employer's health unit as requested by Ms. Workman and Mark Rogers.

The Board gives less weight to appellant's statement. Although she stated that she sustained a right shoulder injury as a result of being handcuffed by an employing establishment police officer, she failed to provide any specific details about the incident. For instance, appellant did not describe the circumstances under which she was handcuffed by the police officer. She did not mention the interference by Jerry Rogers and her subsequent refusal to be escorted to police operations by the police officers. Appellant did not mention her verbal abuse or the combative behavior directed towards Officer Williams. She merely stated that she was waiting for her representative before going to the employing establishment health unit. The evidence establishes that appellant screamed and pulled away from Officer Williams after she witnessed Jerry Rogers being arrested and handcuffed by Officer Donaldson. Appellant's failure to address these details leads the Board to question her account of the April 24, 2009 incident. While she denied sleeping at her desk or taking any medication, she did not provide any witness statements to corroborate her contentions.

Appellant's claim is similar to that in *Soo F. Dong*.⁷ The employee failed to submit proper identification to security guards and precipitated her injury after she began to strike at the guards with a shoe. The Board held that her willful misconduct removed her from the performance of duty.

⁶ *J.S.*, *supra* note 4.

⁷ 47 ECAB 800 (1996).

The Board finds that appellant engaged in willful misconduct as she refused to cooperate with employing establishment police officers by refusing to walk, screaming and physically asserting herself while being escorted on April 24, 2009. It was her unjustified deliberate attempt to physically remove herself from Officer Williams' custody, in wanton or reckless disregard of probable injurious consequences that resulted in her injury. The injury that appellant sustained to her right shoulder as a result of her misconduct is statutorily excluded from coverage under the Act.⁸

CONCLUSION

The Board finds that appellant's claimed injury of April 24, 2009 was caused by her willful misconduct.

ORDER

IT IS HEREBY ORDERED THAT the November 20 and August 18, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 15, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁸ *Id.* (the Board found that appellant's unjustified deliberate attempt to physically remove an employing establishment's privacy officer from the office by force in wanton or reckless disregard of probably injurious consequences caused any injury appellant sustained to be statutorily removed from coverage under the Act).